

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

EDWARD BUKSTEL v. LEARNED JEREMIAH HAND, et al.	CIVIL ACTION NO. 15-375
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MEMORANDUM AND ORDER

AND NOW, this 17th day of March, 2015, Plaintiff Edward Bukstel has filed two motions in this case. One motion seeks permission to serve Defendants by email or by publication, and, for a second time, seeks various forms of “Ex Parte” preliminary injunctive relief under Fed. R. Civ. P. 65 (ECF 7). The other motion seeks leave to file an amended complaint (ECF 8).¹

I. Motion for Service by Publication or by Email

This case is related to Advanced Multilevel Concepts, Inc. v. Bukstel, No. 11-cv-3718 (E.D. Pa.), which was dismissed with prejudice on May 23, 2013. Initially, the Court has preliminary views that some of the claims stated by Plaintiff may be res judicata as to at least some of the claims and defendants in Civil Action 11-3718. Nonetheless, the Court granted Plaintiff’s pro se application to proceed in forma pauperis and the Court has ordered the United States Marshal to serve the summons and complaint upon the Defendants (ECF 5). None of the Defendants have responded to the complaint, the 120-day period allowed for service of the summons under Fed. R. Civ. P. 4(m) has not yet run, and the Marshals Service has not submitted Form USM-285 or otherwise indicated that it has or has not been able to serve defendants. It will therefore be ordered that Plaintiff’s Motion to serve Defendants by publication or by email (ECF

¹ Although Defendants have not yet been served, Plaintiff seeks leave to amend under Fed. R. Civ. P. 15(a)(2).

7) is denied without prejudice. If Plaintiff requests similar relief in a future motion, Plaintiff must show that the Marshals Service concluded it was unable to serve Defendants.

II. Motion for Leave to Amend the Complaint

Bukstel's proposed Amended Complaint, which is attached to his Motion (ECF 8), seeks to add more than thirty additional Defendants and alleges eleven causes of action. The Court has reviewed the Amended Complaint and concluded that nine of the causes of action may fail to state a claim upon which relief can be granted, for the following reasons:

- A. Count 2 (Cybersquatting): It appears that Bukstel lacks the capacity to bring this claim. Exhibit 1 to the proposed Amended Complaint indicates that the VitaminSpice trademark is registered to VitaminSpice LLC. By its plain text, 15 U.S.C. § 1125(d) provides for civil actions only by "the owner of a mark." VitaminSpice LLC is not a party to this case. Even if it were a party, as a pro se plaintiff and non-attorney, Bukstel is not permitted to represent VitaminSpice LLC in this Court, even if he alleges he is the sole corporate officer of VitaminSpice LLC. Boyd v. Wilmington Trust Co., 630 F. Supp. 2d 379, 385 (D. Del. 2009).
- B. Counts 3, 4, 7, and 8 (Counts Related to Securities Fraud): These causes of action relate to allegations of securities fraud that appear to be similar to and arise from the same set of facts as the allegations of securities fraud and common law fraud in Bukstel's Amended Counterclaims in Advanced Multilevel Concepts, Inc. v. Bukstel, No. 11-cv-3718 (E.D. Pa.). The Amended Counterclaims in that case, along with the rest of the case, were dismissed with prejudice. As a result, it appears that these claims, at least as to Defendant Jehu Hand and possibly as to other Defendants, may be barred by the doctrine of claim preclusion/res judicata. In

addition, these causes of action may be time barred by the applicable statute of limitations. See 28 U.S.C. § 1658(b).

- C. Count 5 (Fed. R. Civ. P. 60(b)(6)): There does not appear to be a legal basis for this claim. Federal Rule of Civil Procedure 60(b)(6) allows a party to move for relief from a final judgment, order, or proceeding for “any other reason that justifies relief.” In a December 9, 2014 Memorandum and Order, the Court determined that Bukstel was not entitled to relief under Fed. R. Civ. P. 60 from the order dismissing Advanced Multilevel Concepts, Inc. v. Bukstel, No. 11-cv-3718 (E.D. Pa.). Rule 60(b)(6) does not provide for an independent civil action.
- D. Count 9 (Evidence tampering): There does not appear to be a legal basis for this claim. Although tampering with evidence or obstruction of justice can be the basis for a criminal prosecution, e.g. 18 Pa. C.S.A. § 4910; 18 U.S.C. §§ 1501-1521, the proposed Amended Complaint does not establish any basis for this claim in a civil action under Pennsylvania or federal law.
- E. Count 10 (Gross Negligence Regarding Securities Fraud): There does not appear to be a legal basis for this claim. This count purports to assert a claim for “Gross Negligence Promoting and Covering up Securities Fraud” but does not identify any legal basis for such a claim. To the extent it is intended to assert a claim for wrongful use of civil proceedings under 42 Pa. C.S.A. § 8351, this claim does not identify a civil proceeding that was terminated in Bukstel’s favor, as required by § 8351(a)(2). Under Pennsylvania law, the settlement and dismissal of Advanced Multilevel Concepts, Inc. v. Bukstel, No. 11-cv-3718 (E.D. Pa.) does not appear to have been a “favorable termination” for Bukstel. D’Elia v. Folino, 933 A.2d 117,

122 (Pa. Super. 2007) (“A withdrawal of proceedings stemming from a compromise or agreement does not, as a matter of law, constitute a termination favorable to the party against whom proceedings have been brought originally.”).

- F. Count 11 (Violation of the Rules of Professional Conduct): There does not appear to be a legal basis for this claim. This claim alleges violations of the Pennsylvania Rules of Professional Conduct (adopted by this Court in Local Rule 83.6, Rule IV(B)). However, the Rules of Professional Conduct explicitly state that “[v]iolation of a Rule should not itself give rise to a cause of action against a lawyer” and the Rules “are not designed to be a basis for civil liability.” Pa. R. Prof. Conduct, Preamble ¶ 19.

Although under the provisions of Rule 15(a)(1), Fed. R. Civ. P., Bukstel may amend his complaint without leave of the Court, his doing so before the original complaint has been served on the three original Defendants named in the original complaint is confusing. The Court will not authorize service of the amended complaint until service of the original complaint is completed and Bukstel addresses the potential defects identified above.

It will therefore be ordered that Bukstel shall file, within 30 days of the date of this Memorandum and Order, a supplemental brief in support of his motion to amend, limited to ten (10) pages double-spaced, that cites the specific legal authority showing that the nine alleged causes of action discussed above state claims upon which relief may be granted and are not barred by claim preclusion/res judicata or by the statute of limitations. The Court will hold Bukstel’s Motion for Leave to Amend (ECF 8) under advisement.

III. Motion for Temporary Restraining Order and Other Preliminary Injunctive Relief

The Court previously determined that preliminary relief under Fed. R. Civ. P. 65 will not be considered until after Defendants have been served with copies of all pleadings and motions (ECF 4). As described above, it appears that such service has not yet occurred. It will therefore be ordered that Plaintiff's Motion seeking "Ex Parte" preliminary injunctive relief (ECF 7) is denied without prejudice. However, if Plaintiff requests similar relief in a future motion, Plaintiff must show that Defendants have been served with the pleadings and motion.

IV. Conclusion and Order

For the foregoing reasons, it is hereby **ORDERED** that Bukstel's Ex Parte Motion seeking various forms of preliminary injunctive relief and seeking service of Defendants by email or by publication (ECF 7) is **DENIED WITHOUT PREJUDICE**.

It is further **ORDERED** that Bukstel's Motion for Leave to Amend (ECF 8) is taken under advisement and Bukstel is **ORDERED** to file, within 30 days of the date of this order, a supplemental brief in support of his motion to amend, limited to ten (10) pages double-spaced, that cites the specific legal authority showing that the nine alleged causes of action discussed in this Memorandum and Order state claims upon which relief may be granted and are not barred by claim preclusion/res judicata or by the statute of limitations.

BY THE COURT:

/s/ Michael M. Baylson

MICHAEL M. BAYLSON, U.S.D.J.